SUPREME COURT, U. S.

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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1969**

**No. 1171**

THE FIRST NATIONAL BANK OF SANTA FE,

*Appellant,*

v.

THE COMMISSIONER OF REVENUE OF THE STATE OF NEW MEXICO,

*Appellee.*

**On Appeal from the Court of Appeals of the State of New Mexico**

## JURISDICTIONAL STATEMENT

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**No.**

THE FIRST NATIONAL BANK OF SANTA FE,

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v.

THE COMMISSIONER OF REVENUE OF THE STATE OF NEW MEXICO,

*Appellee.*

**On Appeal from the Court of Appeals of the State of New Mexico**

## JURISDICTIONAL STATEMENT

Appellant, a national bank ("the Bank"), appeals from a final judgment of the Court of Appeals of the State of New Mexico, entered on October 15, 1969, affirming the decision of the Appellee Commissioner of Revenue that the Bank was properly required to pay New Mexico gross receipts taxes upon service fees it received for performing electronic data processing of demand deposit accounts for four other banks.

### Opinions Below

The majority and dissenting opinions in the Court of Appeals of the State of New Mexico are reported at 460 P.2d 64. The order of the Supreme Court of the State of New Mexico denying certiorari is reported at 460 P.2d 72. The decision of the Commissioner of Revenue is unreported. The opinions in the Court of Appeals, the order of the Supreme Court denying

certiorari, the final judgment of the Court of Appeals, and the decision of the Commissioner of Revenue are set forth in Appendix A.

## Jurisdiction

The opinions in the Court of Appeals of the State of New Mexico were filed on September 5, 1969. Appellant's Application for Writ of Certiorari was denied by the Supreme Court of the State of New Mexico on October 15, 1969, and the final judgment of the Court of Appeals was entered on the same day. The notice of appeal was filed in the Court of Appeals on December 19, 1969. On December 30, 1969, Mr. Justice Brennan granted Appellant's motion for an extension of time to docket the appeal to and including February 12, 1970.

The jurisdiction of this Court to review this case upon appeal is conferred by 28 U.S.C. §§ 1257(2), 2101(c). The following decisions sustain the jurisdiction of this Court to review the judgment below on appeal: *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 160 (1954); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 287-90 (1921).

## Questions Presented

1. May a state impose a tax not authorized by 12 U.S.C. § 548 upon a service performed by a national bank on the ground that the service is *ultra vires* a national bank or not in the course of its regular banking functions?

2. Is a national bank's performance of electronic data processing services for other banks within its authorized powers?

3. Does a national bank lose the protection of 12 U.S.C. § 548 where it is legally obligated to pay the tax under state

law, but has by contract passed the economic burden of the tax on to others?

## Statutes Involved

Section 2 Seventh of the National Bank Act, as amended, 12 U.S.C. § 24 Seventh (in relevant part); section 5219 of the Revised Statutes, as amended, 12 U.S.C. § 548; section 4 of the Bank Service Corporation Act of 1962, 12 U.S.C. § 1864; section 6 of the New Mexico Banking and Financial Corporations Tax Act, N.M. Stat. § 72-15B-6; and sections 4 and 12.8 of the New Mexico Gross Receipts and Compensating Tax Act, N.M. Stat. §§ 72-16A-4,-12.8, are set forth in Appendix B.

## Statement

Appellant, The First National Bank of Santa Fe, owns electronic data processing equipment upon which it maintains and processes its demand deposit and checking account records (R. 15). The Bank has entered into agreements with four banks, three state banks and one national bank, under which it performs similar electronic data processing of their demand deposit account records for a service fee (R. 16). The agreements provide that the four banks shall pay to the Bank "any applicable taxes or assessments however designated which may be lawfully levied or assessed" upon the agreements (R. 21). The Appellee Commissioner of Revenue of the State of New Mexico collected $2,568.23 in New Mexico state and municipal gross receipts taxes from the Bank on the basis of the service fees paid by the four banks from July 1, 1967 to September 30, 1968 (R. 17).

The Bank petitioned the Commissioner of Revenue for refund of these taxes, on the ground, among others, that the collection of such taxes from a national bank violated the United States Constitution and 12 U.S.C. § 548 (R. 12). The Commissioner denied the Bank's petition for refund on the ground that its electronic data processing of demand accounts for other banks is *ultra vires*, being neither "a governmental function [n]or a banking function but instead . . . a non-banking commercial accounting service" (23a-24a).

The Bank appealed the Commissioner's decision to the Court of Appeals of the State of New Mexico (R. 1), and the Court of Appeals affirmed by a 2-1 vote. The opinion of the court, written by Judge Oman, agreed with the Commissioner's holding that a national bank's performance of electronic data processing services for other banks is *ultra vires*, or at least not reasonably related to its banking functions, and is therefore not protected from state taxation by 12 U.S.C. § 548:

> "We are of the opinion that the question of the propriety of the imposition of a tax on an activity or service performed by a national bank should be determined on the basis of whether the activity or service is reasonably related or incidental to the accomplishment of its bank functions." (6a.)
>
> "The fact that the enumerated powers of a national bank do not include the performance of such services for other banks, the fact that Bank Service Corporations are expressly empowered to perform such services for banks, and the fact that Congress has not limited the taxation by a state of Bank Service Corporations, indicates to us that Congress does not intend that the performance of these services may not be taxed by a state. It seems illogical to us to

> hold that Congress intended to limit a state's taxation on functions or services performed by national banks, when such functions or services are clearly not necessary, and not reasonably incident, to the execution of the powers conferred by Congress thereon." (4a.)

The majority observed that this holding was consistent with 1969 enactments of the New Mexico Legislature, N.M. Stat. §§ 72-15B-6, 72-16A-12.8 (29a-30a), limiting the exemption of banks from the New Mexico gross receipts tax to their receipts "in the course of their regular banking . . . functions" (6a).

Alternatively, the majority held that since the Bank had passed the taxes on to its customer banks by contract, it was not the "real taxpayer" (13a).

Chief Judge Spiess, dissenting, doubted that the Bank's performance of electronic data processing was *ultra vires*, but noted that in any event 12 U.S.C. § 548 permits only certain forms of state taxation of national banks, and said:

> "The Act clearly does not grant permission to the states to tax a national bank with respect to an activity which is ultra vires. To justify such levy the state should point to permissive language in Congressional legislation, which, of course, it is unable to do." (15a.)

As to the majority's alternative holding that the Bank was not the "real taxpayer", Chief Judge Spiess stated that since the Bank's agreements with its customer banks bound the latter to pay only taxes which were "lawfully levied and assessed" (R. 21), the agreements furnished no "justification for the state to impose the tax unless it is lawful so to do" (15a).

The Supreme Court of the State of New Mexico denied Appellant's Application for Writ of Certiorari on October 15, 1969, and on the same day the Court of Appeals entered the final judgment from which this appeal is taken.

Appellant appeals from this final judgment under 28 U.S.C. §§ 1257(2), 2101(c) on the ground that the application of the tax imposed by section 4 of the New Mexico Gross Receipts and Compensating Tax Act, N. M. Stat. § 72-16A-4, to its service fees from the performance of data processing services for other banks is repugnant to the Constitution and laws of the United States, in particular to 12 U.S.C. § 548.

## The Questions Are Substantial

### I

**The New Mexico court has unlawfully imposed upon a national bank a tax not authorized by 12 U.S.C. § 548, on the untenable theory that a state may tax any national bank activity which it regards as *ultra vires* or unrelated to regular banking activities.**

The New Mexico Court of Appeals has held that New Mexico may impose a gross receipts tax upon any activity of a national bank which New Mexico regards as *ultra vires* or not in the course of its regular banking functions. At the same time it acknowledged that under this Court's decision in the *Berkshire Bank* case, *First Agricultural Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 341-46 (1968), a state may tax national banks only in the manner and to the extent authorized by section 5219 of the Revised Statutes, as amended, 12 U.S.C. § 548. During the period

involved in this case, 12 U.S.C. § 548 permitted a state to impose only real estate taxes and a tax on either national bank shares, dividends paid, or net income; no state tax was authorized on the gross income or gross receipts of national banks (25a-27a).

The decision of the court below brings to this Court for the first time the question whether a state may avoid the limitations of 12 U.S.C. § 548 on the ground that a national bank is engaged in an activity which is either *ultra vires* or not in the course of its regular banking functions. This question is a highly significant one, despite the amendment of 12 U.S.C. § 548 after the decision below, for at least two reasons. First, the recent amendment, while it broadens the classes of taxes which the states may impose upon national banks, reaffirms the fundamental policy of nondiscrimination in taxation between state and national banks.* If the decision of the New Mexico court is correct, the states may (subject only to basic constitutional limitations) ignore this policy of nondiscrimination in the case of any national bank activity which they deem *ultra vires* or outside the course of regular banking functions. Second, the New Mexico court's decision asserts that a state may, as New Mexico has attempted to do in N.M. Stat. 72-16A-12.8 (*see* p. 5 *supra*), impose a greater tax burden upon

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* The amendment was accomplished by P.L. 91-156, 91st Cong., 1st Sess., signed by the President on December 24, 1969 (*see* 27a-28a). Effective January 1, 1970, this enactment adds to 12 U.S.C. § 548 a provision authorizing states to impose upon national banks having their principal offices within the state any general nondiscriminatory tax (other than a tax on intangible personal property) in the same manner and to the same extent as the tax is imposed on state banks. A somewhat narrower authorization applies to out-of-state national banks. Effective January 1, 1972, the new law amends 12 U.S.C. § 548 to provide that national banks shall be treated in the same manner as state banks for purposes of both federal and state taxation.

national banks in respect of those activities which in its judgment are outside the course of regular banking functions. This assertion of state power to discourage certain national bank activities by differential taxation conflicts with the aim of the National Bank Act to establish a system of national banks with generally uniform powers.

The fundamental flaw in the reasoning of the New Mexico court is the fact that 12 U.S.C. § 548 does not authorize state taxation of national banks on the grounds relied on by the court. This Court has made clear in numerous cases that 12 U.S.C. § 548 was enacted by Congress in 1864 to regulate the entire field of state taxation of national banks, and prohibits all state taxes upon national banks which it does not expressly authorize. In *First Agricultural Nat'l Bank* v. *State Tax Comm'n*, 392 U.S. 339, 343 (1968), for example, this Court stated:

> "It seems clear to us from the legislative history that 12 U.S.C. § 548 was intended to prescribe the only ways in which the States can tax national banks."

Again, in *Bank of California, N. A.* v. *Richardson*, 248 U.S. 476, 483 (1919), the Court held:

> "There is also no doubt from [12 U.S.C. § 548] that it was intended to comprehensively control the subject with which it dealt and thus to furnish the exclusive rule governing state taxation as to the federal agencies created as provided in the section."

And again, in *Owensboro Nat'l Bank* v. *Owensboro*, 173 U.S. 664, 669 (1899), the Court ruled:

> "This section [5219], then, of the Revised Statutes is the measure of the power of a State to tax national banks, their property or their franchises. By its unambiguous provisions the power is confined to a taxa-

> tion of the shares of stock in the names of the shareholders and to an assessment of the real estate of the bank. Any state tax therefore which is in excess of and not in conformity to these requirements is void."

Two strong national policies underlie the congressional decision to regulate the entire field of state taxation of national banks by means of 12 U.S.C. § 548. The first policy, clearly enunciated in Chief Justice Marshall's celebrated opinion in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 425-37 (1819), is that of protecting national banks, as federal instrumentalities, from hostile and destructive state taxation. *See First Agricultural Nat'l Bank* v. *State Tax Comm'n*, 392 U.S. 339, 342 (1968) (quoting remarks of Senator Sumner in 1864); Cong. Globe, 38th Cong., 1st Sess. 1451 (1864) (remarks of Representative Hooper). The power claimed by New Mexico in this case, that of taxing at a higher rate national bank activities which the state does not consider regular banking functions, would permit just such destructive taxation. The other national policy embodied in 12 U.S.C. § 548 is that of equality of taxation between national and state banks, in order to "render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition. . . ." *Mercantile Bank* v. *New York*, 121 U.S. 138, 155 (1887). This policy is also contravened by the holding of the New Mexico court, since under that decision a state may with impunity subject national bank activities which it deems either *ultra vires* or outside the normal course to disabling and openly discriminatory taxation.

During the period of over a century following the enactment of the predecessor of 12 U.S.C. § 548 in 1864, the principle that the protection of 12 U.S.C. § 548 extends to national bank activities which are deemed to be unusual or

*ultra vires* seems to have been almost universally accepted in practice. Only four cases have been found in which the argument was advanced that 12 U.S.C. § 548 does not protect national bank activities or property which are not reasonably related to regular banking functions. In only one of these cases has the result of the court below been reached. *State* v. *Whitney Nat'l Bank*, 189 La. 211, 179 So. 84 (1938) (office building rentals).* In the other three cases the courts have held that 12 U.S.C. § 548 applies regardless of "the amount or kind of business in which a national banking association may engage." *First Nat'l Bank & Trust Co.* v. *McDonald*, 289 F. Supp. 493, 496 (W.D. Okla. 1968) (equipment leasing); *Bank of California, N. A.* v. *King County*, 16 F. Supp. 976 (W.D. Wash. 1936) (same) (*semble*); *O'Neil* v. *Valley Nat'l Bank*, 58 Ariz. 539, 121 P.2d 646 (1942) (office building rentals).** See also *Northwestern Nat'l Bank* v. *Gillis*, 82 S.D. 457, 459-64, 148 N.W.2d 293, 294-96 (1967) (cafeteria for employees and guests); *National Bank* v. *Department of Revenue*, 340 Mich. 573, 66 N.W.2d 237 (1954); *appeal dismissed*, 349 U.S. 934 (1955) (cafeteria for employees). We submit that this Court should resolve the conflict between these cases, representing the

* The Kansas Supreme Court reached a similar result under the related Federal Farm Loan Act in *Federal Land Bank* v. *Board of County Comm'rs*, 187 Kan. 148, 354 P.2d 679 (1960). This Court reversed on the ground that the activity was not *ultra vires*, 368 U.S. 146 (1961); whether the state could have taxed it if it had been *ultra vires* was apparently not argued in this Court. *See* 7 L. Ed. 2d at 882-83.

** The Court of Appeals drew support from a later decision of an intermediate Arizona court, *Arizona State Tax Comm'n* v. *First Bank Bldg. Corp.*, 5 Ariz. App. 594, 429 P.2d 481 (1967), also involving office building rentals. That case turned, however, on the fact that the building was owned by a subsidiary, not by the national bank.

weight of practice and authority, and the decision of the New Mexico Court of Appeals.

The court below relied upon two lines of authority which do not support its position. First, it stated that "exemption or immunity from taxation is to be narrowly restricted," citing *Bank* v. *Tennessee*, 104 U.S. 493 (1882) (6a-7a). But this case is an application of the principle that a state charter or statute which is claimed to give up the state's power to tax a corporation will be narrowly construed. *See, e.g., Wiggins Ferry Co.* v. *East St. Louis*, 107 U.S. 365, 371 (1883). This principle has no application to 12 U.S.C. § 548, which is not a relinquishment by the states of any power to tax, but a regulation by Congress permitting certain forms of state taxation and prohibiting all forms of taxation not specifically permitted. *Cf. Maricopa County* v. *Valley Nat'l Bank*, 318 U.S. 357, 361-62 (1943). No other decision under 12 U.S.C. § 548 has relied upon *Bank* v. *Tennessee*. The court below also relied upon cases such as *City of Phoenix* v. *Bowles*, 65 Ariz. 315, 180 P.2d 222 (1947), holding that states and their subdivisions enjoy no tax immunity for proprietary, as distinguished from governmental, functions (8a-9a). But the decisions of this Court establish that all of the activities of a federal instrumentality, such as a national bank, are governmental. *See, e.g., Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 101-02 (1941); Powell, *The Waning of Intergovernmental Tax Immunities*, 58 Harv. L. Rev. 633, 651-56 (1945).*

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* The Louisiana Supreme Court, in the *Whitney National Bank* case, *supra* p. 10, relied upon this Court's holding in *First Nat'l Bank* v. *Missouri ex rel. Barrett*, 263 U.S. 640, 659-61 (1924), that a state may enforce its legislation prohibiting branch banking against an *ultra vires* branch of a national bank. This holding is inapplicable to state taxation of national banks, however, in view of the clear congressional intent manifested in 12 U.S.C. § 548 to prohibit all forms of state taxation of national banks not expressly permitted, and no other case has applied it under 12 U.S.C. § 548.

The decision of the court below presents to this Court for the first time a fundamental question under 12 U.S.C. § 548: whether a state may avoid all the limitations of that section on the ground that a national bank is engaging in an *ultra vires* activity or one which is outside the course of regular banking functions. The recent amendment to 12 U.S.C. § 548, broadening for the future the categories of permissible state taxes upon national banks, *see* p. 7 *supra*, renders it all the more important that the universal applicability of the basic policy of equal treatment embodied in 12 U.S.C. § 548 be reaffirmed by this Court.

## II

**The New Mexico court erred in holding, in the face of modern banking practice and a specific ruling of the Comptroller of the Currency, that a national bank's rendition of electronic data processing services for other banks is *ultra vires*.**

The New Mexico Court of Appeals reached the conclusion that the performance of electronic data processing services for other banks is *ultra vires* a national bank, or at least outside the course of its regular banking functions, from

> "The fact that the enumerated powers of a national bank do not include the performance of such services for other banks, [and] the fact that Bank Service Corporations are expressly empowered to perform such services for banks" (4a).

Appellant has relied in furnishing data processing services to other banks upon a specific ruling of the Comptroller of the Currency that:

> "Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers." Comptrollers Manual for National Banks, Rulings, ¶ 3500.

This ruling is supported by weighty policy considerations. Many national banks, in order to obtain the most efficient and economical data processing equipment, must buy equipment which has more processing capacity than they can immediately use. *E.g., Hearings on H.R. 9548 Before the Subcommittee on Bank Supervision and Insurance of the House Committee on Banking and Currency*, 88th Cong., 2d Sess. 84-85 (1964). In such situations, as the Comptroller has concluded, "if a bank is to achieve the full utilization of its investment in such equipment, it must make it available for the use of others even though it is acquired for the primary purpose of performing services incidental to banking." 102 Compt'r Curr. Rep. 258 (1964). A national bank's right to do this stands on the same footing as its unquestioned right "to own its office building and to spread its expenses and operating costs by renting space to tenants." *Wirtz* v. *First Nat'l Bank & Trust Co.*, 365 F.2d 641, 644 (10th Cir. 1966); *Brown* v. *Schleier*, 118 F. 981, 984 (8th Cir. 1902), *aff'd on other grounds*, 194 U.S. 18 (1904); *see Wingert* v. *First Nat'l Bank*, 223 U.S. 670, 672 (1912).

Moreover, demand deposit record keeping has traditionally been a function performed by correspondent banks for smaller rural banks. If national banks are forbidden to perform electronic data processing for other banks, this important service must be abandoned as demand deposit accounting comes to be performed electronically. *E.g., Hearings on H.R. 112 Before the Subcommittee on Bank*

*Supervision and Insurance of the House Committee on Banking and Currency*, 89th Cong., 2d Sess. 82 (1966). These considerations confirm the validity of the Comptroller's ruling that national banks may perform electronic data processing for other banks under the incidental powers clause of section 2 Seventh of the National Bank Act, 12 U.S.C. § 24 Seventh.

The New Mexico Court of Appeals gave two reasons for its holding to the contrary. The first was that 12 U.S.C. § 24 Seventh does not in so many words authorize national banks to perform electronic data processing for others. But the incidental powers conferred by 12 U.S.C. § 24 Seventh are not limited to the powers expressly listed in that section. *See, e.g., Colorado Nat'l Bank* v. *Bedford*, 310 U.S. 41, 48-50 (1940) (safe deposit business); Beatty, *The Incidental Powers of National Banks*, 4 Nat'l Banking Rev. 263, 265 (1967). The second reason advanced by the court below was the fact that section 4 of the Bank Service Corporation Act of 1962, 12 U.S.C. § 1864, expressly authorizes bank service corporations (joint venture corporations formed by banks to furnish data processing services) to perform such services solely for banks. From this the court below apparently drew the conclusion that national banks were impliedly prohibited from performing such services. But no such prohibition can be found in the Bank Service Corporation Act or in its legislative history. Indeed, the legislative history shows that it was recognized at the time that national banks were providing data processing services to banks and others. *See, e.g.*, 108 Cong. Rec. 16501 (1962) (remarks of Rep. Reuss); *Hearings on H.R. 7796 Before the Senate Committee on Banking and Currency*, 87th Cong., 2d Sess. 49 (1962). Bills to bar national banks from providing such

services have twice been the subject of House hearings, but both times have failed to get out of Committee. H.R. 9548, 88th Cong., 2d Sess. (1964); H.R. 10529, 89th Cong., 2d Sess. (1966).* This legislative history establishes that section 4 of the Bank Service Corporation Act does not by implication bar national banks from providing data processing services to others.**

Whether national banks may perform data processing services for other banks is an issue of increasing importance both for national banks and for the future development of data processing. According to a 1967 survey, 82 per cent of the banks with assets between $50 and $100 million, and 98 per cent of those with assets of $500 million or more, offered data processing services to others. Petition for Certiorari, *Camp v. Wingate Corp.*, No. 225, Oct. Term, 1969, p. 9. The question whether national banks may perform such services for others is closely related to the question whether section 4 of the Bank Service Corporation Act confers standing upon data processing service organizations to challenge national banks' rendition of such services. This standing question is presented by *Association of Data Processing*

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* The House has, however, passed a bill, H.R. 6778, 91st Cong., 1st Sess. (1969), section 2(f) of which would amend section 4 of the Bank Holding Company Act of 1956, 12 U.S.C. §1843, to declare certain activities "neither necessary, incidental, nor related to carrying on the business of banking or of managing or controlling banks, and . . . not in the public interest to be carried on by bank holding companies or subsidiaries thereof". One of these activities is "engaging in the business of providing data processing services except (A) as an incident to banking services such as the preparation of payrolls, or (B) to the extent necessary to make economical use of equipment primarily acquired and used for the bank holding company or its bank subsidiaries."

** If any implication were to be drawn from the Bank Service Corporation Act as to the powers of national banks, the most natural implication would be that national banks, like bank service corporations, may at least perform data processing services for banks.

*Serv. Orgs., Inc.* v. *Camp*, 406 F.2d 837 (8th Cir.), *cert. granted*, 395 U.S. 976 (1969), which was argued in this Court on November 18, 1969. It is also presented by *Arnold Tours, Inc.* v. *Camp*, 408 F.2d 1147, 1152-53 (1st Cir. 1969), *petition for cert. pending sub nom. Industrial Nat'l Bank* v. *Wingate Corp.*, No. 129, Oct. Term, 1969. The question on the merits which this case presents, is, we submit, of at least equal importance. Probable jurisdiction should be noted in this case in order to resolve the question whether national banks may perform such data processing services for other banks.

## III

### The alternative holding that the bank is not the "real taxpayer" cannot sustain the decision below.

The New Mexico Court of Appeals held that even if the Bank's data processing services were not *ultra vires*, "in any event, the Bank is not the 'real taxpayer'" (13a). The court acknowledged that under New Mexico law "the legal incidence of the tax is on the Bank" (12a). However, it construed *Colorado Nat'l Bank* v. *Bedford*, 310 U.S. 41 (1940), as indicating that 12 U.S.C. § 548 is inapplicable whenever the economic impact of a state tax is shifted by a national bank to its customers, and noted that in this case the four customer banks had agreed to reimburse the Bank for "any applicable taxes or assessments . . . which may be lawfully levied or assessed" (R. 21), and that "it is a common practice in New Mexico" to pass on the economic impact of this gross receipts tax (13a).

This Court's decisions firmly establish, however, that for the tax immunity of the United States and its instrumentalities it is the legal incidence, not the ultimate eco-

nomic impact, of a state tax which is controlling. In *Alabama* v. *King & Boozer*, 314 U.S. 1 (1941), this Court upheld an Alabama sales tax imposed upon a government contractor even though the economic impact of the sales tax was passed on directly to the United States under a cost-plus contract. The Court made clear in *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110, 122 (1954), that the decisive factor in *King & Boozer* was that "the legal incidence of that tax was held to fall on the independent contractor and not upon the United States", and that where the legal incidence of the state tax did fall upon the United States the tax was invalid. Legal incidence, rather than economic impact, was reaffirmed as the decisive test in *United States* v. *City of Detroit*, 355 U.S. 466, 473 (1958), where this Court emphasized that the rules set forth in *King & Boozer* had been adopted as "the least complicated, the most workable and the proper standards for decision in this much litigated and often confused field".

The general principle that legal incidence is the decisive factor in the state taxation of the United States and its instrumentalities is fully applicable to the taxation of national banks. For example, if a state sales tax is required by law to be passed on to the purchaser, a national bank purchaser is exempt from it. *First Agricultural Nat'l Bank* v. *State Tax Comm'n*, 392 U.S. 339, 347-48 (1968); *cf. Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 99 (1941). The case upon which the court below relied, *Colorado Nat'l Bank* v. *Bedford*, 310 U.S. 41, 52 (1940), is in full accord with this principle. It holds that where the legal incidence of a state tax falls not upon a national bank but upon its customers, 12 U.S.C. § 548 is not violated by the fact that the national bank is under a statutory duty

to collect the tax. The *Bedford* case has no application where, as here, the legal incidence of the state tax falls upon the national bank itself.

Thus, since the legal incidence of the New Mexico gross receipts tax in this case is upon the Bank, the Bank is entitled to the protection of 12 U.S.C. § 548.

## CONCLUSION

**The decision of the New Mexico Court of Appeals raises serious questions of general and continuing application as to the powers of state authorities over the activities of national banks. The decision seems clearly contrary to the decisions of this Court, which establish that 12 U.S.C. § 548 is an exclusive grant of authority to the states to tax national banks. In the field of electronic data processing, the decision ignores the weight of modern banking practice and runs directly counter to a specific ruling of the Comptroller of the Currency.**

**We respectfully submit that probable jurisdiction should be noted and a hearing on the merits granted.**

Dated: February 11, 1970

Respectfully submitted,

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# APPENDIX A

# APPENDIX A

## Opinion of the Court of Appeals

Filed: September 5, 1969

IN THE
COURT OF APPEALS
OF THE STATE OF NEW MEXICO

No. 288

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THE FIRST NATIONAL BANK OF SANTA FE,

*Claimant-Appellant,*

vs.

THE COMMISSIONER OF REVENUE OF THE STATE OF NEW MEXICO,

*Appellee.*

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DIRECT APPEAL

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OPINION

OMAN, Judge.

This appeal has been taken by the First National Bank of Santa Fe, hereinafter called Bank, from a decision of the

Commissioner of Revenue of the State of New Mexico, hereinafter called Commissioner, whereby the Commissioner denied the Bank's claim for refund of gross receipts tax. The appeal is before this court pursuant to § 72-13-39, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2, Supp.1967), [N.M. Laws 1966, ch. 30, § 3].

The matter was presented to the Commissioner on stipulated facts. None of the findings of fact made by the Commissioner has been challenged. Two points for reversal were asserted by the Bank in its brief in chief. One of these has been conceded by the Commissioner. However, this concession does not dispose of this appeal. We must decide the other and principal point in which the Bank claims: "The State is forbidden to levy the tax in question by Federal law."

The facts essential to an understanding and determination of the issue are as follows:

(1) The Bank is a national banking association organized and existing under and by virtue of 12 U.S.C. § 21 et seq. (1964).

(2) The Bank owns an electronic data processing machine upon which it maintains and processes its own demand and checking account records.

(3) On or after July 1, 1967, the Bank entered into contracts with four unaffiliated banks (three state and one national) to maintain and process their demand account records on the Bank's machine for a fee or charge to be computed on the basis of activity and number of accounts processed.

(4) Electronic data processing of such accounts is a convenience but not a necessity for the conduct of the banking functions of any of the banks. It is a service made available

commercially by non-banking institutions in Albuquerque and elsewhere.

(5) The gross receipts tax was imposed upon the Bank's receipts for bookkeeping or accounting service rendered to the four other banks to whom it was under no obligation, except for the contracts aforesaid.

(6) The tax imposed is not a sales or use tax imposed upon the Bank's purchase of tangible personal property for its own use.

(7) Pursuant to its contracts, the Bank collected from the four banks for whom it performed said services the gross receipts tax, but is obligated to refund the same if successful on this appeal.

The Bank's position is that the majority opinion in Agricultural Nat. Bank v. State Tax Commission, 392 U.S. 339, 88 S.Ct. 2173, 20 L.Ed.2d 1138 (1968), is controlling and under that opinion the state may tax a national bank, except for its real estate, only in one of the four ways authorized by 12 U.S.C. § 548 (1964). Unquestionably, language used by the Supreme Court of the United States in the Agricultural Nat. Bank case, in Des Moines National Bank v. Fairweather, 263 U.S. 103, 44 S.Ct. 23, 68 L.Ed. 191 (1923), and in Owensboro National Bank v. Owensboro, 173 U.S. 664, 19 S.Ct. 537, 43 L. Ed. 850 (1899), supports this position. The opinions in First National Bank of Homestead, Florida v. Dickinson, 291 F. Supp. 855 (N.D.Fla.1968), affirmed without opinion in 393 U.S. 409, 89 S.Ct. 685, 21 L.Ed.2d 634 (1969), and Northwestern National Bank of Sioux Falls v. Gillis, 82 S.D. 457, 148 N.W.2d 293 (1967), also appear to support this position.

However, insofar as we can tell from the opinions therein, none of these cases involved the question of a tax upon fees or charges made by a national bank for commercial services performed outside the scope of its banking powers as authorized by Congress. These powers are specified in 12 U.S.C. § 24 (1964), and they do not include the furnishing of services such as those here involved. Congress has made provision for the creation of "Bank Service Corporations." 12 U.S.C. ch. 18 (1964). These federally-chartered corporations are expressly granted the power to perform for banks such services as those here involved, but there is no congressional limitation on a state's power to tax these corporations.

The fact that the enumerated powers of a national bank do not include the performance of such services for other banks, the fact that Bank Service Corporations are expressly empowered to perform such services for banks, and the fact that Congress has not limited the taxation by a state of Bank Service Corporations, indicates to us that Congress does not intend that the performance of these services may not be taxed by a state. It seems illogical to us to hold that Congress intended to limit a state's taxation on functions or services performed by national banks, when such functions or services are clearly not necessary, and not reasonably incident, to the execution of the powers conferred by Congress thereon.

In Arizona State Tax Com'n. v. First Bank Building Corp., 5 Ariz. App. 594, 429 P.2d 481 (1967), the building corporation was duly organized and qualified to do business in Arizona. All of its issued and outstanding stock was held and owned by the First National Bank of Arizona, a national banking association; the executive committee of the bank served as the board of directors for the building corporation; all

of the officers of the building corporation were also officers of the bank; all of the bookkeeping with respect to the building corporation books and accounts was performed by personnel of the bank; and the building corporation had no employees. The state had assessed against the building corporation a transaction and privilege tax upon rentals from several properties owned by it. It claimed exemption from the tax on the ground that its ownership of the properties was solely for the benefit and convenience of the bank, and that each of its properties had a direct relationship to the transacting of business by the bank. It relied upon the holding in O'Neil v. Valley Nat. Bank of Phoenix, 58 Ariz. 539, 121 P.2d 646 (1942).

The Arizona court of appeals rejected the claimed exemption, and in so doing stated:

> ". . . we would hold that plaintiff having been created as a separate entity enjoying the benefits of a corporate existence including, among others, real estate holding and tax advantages, and although performing functions of importance as a subsidiary of a national bank, the taxing by the commission of the business in which it is engaged herein is not such as to impair the operation of said bank as to make it exempt from state taxation within the meaning of the laws giving it the claimed immunity under 12 U.S.C. § 548. Commissioner of Banks v. Chase Securities Corporation, 298 Mass. 280, 10 N.E. 2d 472 (1937)."

Although the Arizona court based its rejection of the claimed exemption in part upon the separate corporate existence of the building corporation, the quoted language shows the rejection was also predicated in part upon the fact that the imposition of the tax was not such as to impair

the operation of the bank to the extent of clothing the building corporation's activities with immunity under 12 U.S.C. § 548 (1964). That is, the tax exemption granted by Congress to national banks is to be determined not alone by its existence as such a bank, but, at least in part, by the nature of the activities, or services, it has performed upon which a tax is imposed.

We are of the opinion that the question of the propriety of the imposition of a tax on an activity or service performed by a national bank should be determined on the basis of whether the activity or service is reasonably related or incidental to the accomplishment of its bank functions. This is consistent with the intent of the New Mexico Legislature in enacting the present tax law on banks and financial corporations [N.M. Laws, 1969, ch. 151]. Section 6 of this act provides:

> "The taxes imposed by Sections 3 and 4 of the Banking and Financial Corporations Tax Act are in lieu of all other taxes imposed by the state and its political subdivisions upon banks and financial corporations for calendar year 1969 and all subsequent years, *except* taxes upon their real property and *taxes arising from activities which are not in the course of their regular banking* and financial corporation *functions.*" [Emphasis added].

We believe our opinion is also in accord with the declarations of the Supreme Court of the United States to the effect that exemption or immunity from taxation is to be narrowly restricted, and, in case of doubt as to the existence or extent thereof, the doubt should be decided in favor of the

taxing authority. In Bank of Commerce v. Tennessee, 104 U.S. 493, 26 L.Ed. 810 (1882), which involved the extent of tax exemption of a state bank under its charter and the state law, the court stated:

> "That statutes imposing restrictions upon the taxing power of a State, except so far as they tend to secure uniformity and equality of assessment, are to be strictly construed, is a familiar rule. Against the power nothing is to be taken by inference and presumption. Where a doubt arises as to the existence of the restriction, it is to be decided in favor of the State. . . . In our judgment, the limited exemption cannot be extended to property used beyond the actual wants of the Corporation in carrying out the purpose of its creation. As well observed by the Supreme Court of the State, the contract of exemption, beyond the extent prescribed, ceased when taxable property was held for any other purpose.
>
> ". . . . The doctrine declared in them [cited railroad cases] that the exemption, in cases like the one in the charter before us, extends only to the property necessary for the business of the company, is founded in the wisest reasons of public policy. It would lead to infinite mischief if a corporation, simply by investing its funds in property not required for the purposes of its creation, could extend its immunity from taxation, and thus escape the common burden of government."

In Graves v. New York, 306 U.S. 466, 59 S.Ct. 595, 83 L.Ed. 927 (1939), which involved the question of the imposition of a state income tax on the salary of an employee of the Home Owners' Loan Corporation, the court stated:

"... The theory of the tax immunity of either government, state or national, and its instrumentalities, from taxation by the other, has been rested upon an implied limitation on the taxing power of each, such as to forestall undue interference, through the exercise of that power, with the governmental activities of the other. ...

"... the implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted. For the expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed. ..."

In Oklahoma Tax Commission v. Texas Co., 336 U.S. 342, 69 S.Ct. 561, 93 L.Ed. 721 (1949), which involved the question of immunity from state taxation of petroleum produced on Indian lands, the court stated:

"It is true that this Court's more recent pronouncements have beaten a fairly large retreat from its formerly prevailing ideas concerning the breadth of so-called intergovernmental immunities from taxation, a retreat which has run in both directions—to restrict the scope of immunity of private persons seeking to clothe themselves with governmental character from both federal and state taxation. ..."

As to the general presumption against tax exemption and the strictness with which laws granting the same are construed, see City of Phoenix v. Bowles, 65 Ariz. 315, 180 P.2d

222 (1947); McKee, etc. v. Bureau of Revenue, 63 N.M. 185, 315 P.2d 832 (1957); Flaska v. State, 51 N.M. 13, 177 P.2d 174 (1946); Samosa v. Lopez, 19 N.M. 312, 142 P.927 (1914).

In the case of Northwestern National Bank of Sioux Falls v. Gillis, supra, the Supreme Court of South Dakota, as above stated, apparently interpreted the provisions of 12 U.S.C. §548 (1964), in accordance with the position here taken by the Bank, in that it held that a sales tax could not properly be imposed on a national bank for the sale and service by it of food and refreshments to its employees and guests in a cafeteria maintained by it for the convenience of those so served. This result was reached on the ground that the legal incidence of the sales tax rested on the bank as the retailer. Apparently no question was raised as to the propriety of the imposition of the tax by reason of the nature of the activity in which the services were performed and the sales accomplished.

The South Dakota court, however, required the bank to pay exactly the same amount as the state had sought to recover by the imposition of the sales tax. This the court did by holding the use tax applicable to the sales of food. This result was reached on the ground that the legal incidence of this tax fell upon the purchasers, and it was the duty of the bank to collect the tax from them. The fact that the tax was not actually collected made no difference, because the obligation to collect the tax and pay that amount to the state became an indebtedness by the bank to the state. The state could and did properly recover from the bank on this indebtedness an amount equal to the tax which the bank had failed to collect. In accord with this holding is the hold-

ing of the California court in Bank of America Nat. Trust & S. Ass'n v. State Bd. of Eq., 209 Cal.App.2d 780, 26 Cal. Rptr. 348 (1962).

Both the South Dakota and California courts relied upon Colorado National Bank v. Bedford, 310 U.S. 41, 60 S.Ct. 800, 84 L.Ed. 1067 (1940), as implying that a national bank may be made the agent of the state to collect a valid tax imposed on a third person with whom the bank deals. In failing to perform this duty as an agent of the state, the state may recover as a debt from the national bank an amount equal to the tax it failed to collect.

In the Colorado Bank case the statute there involved imposed:

> ". . . upon the services specified in the act, a percentage tax based upon the value of the services rendered or performed by any person subject to its provisions.
>
> ". . . [the] tax [was] equivalent to two per cent of the value of services rendered by banks, finance companies, trust companies and depositories . . . The person rendering the services 'shall be liable and responsible for the payment of the entire amount . . . ."

It was also provided that:

> ". . . persons rendering or performing the services are required 'as far as practicable, [to] add the tax imposed . . . to the value of services or charges showing such tax as a separate and distinct item and when added such tax shall constitute a part of such value of service or charge, *shall be a debt from the user to the person rendering or performing service* until paid, and shall be recoverable at law in the

> same manner as other debts.' . . . the person rendering the service [was] forbidden to hold out directly or indirectly that he [would] assume or absorb the tax."

The service there involved was the rental of safe-deposit boxes located in a portion of the bank's vaults. The state contended, " . . . the tax was on a non-banking activity foreign to its [the bank's] federal character and on the user of the services . . ."

The court, in passing on these questions, stated in part:

> ". . . Though the national banks' usefulness as an agency to provide for currency has diminished markedly, their importance as general bankers shows a constant growth. We may assume that national banks possess only the powers conferred by Congress. These . . . include 'all such incidental powers as shall be necessary to carry on the business of banking.' . . . We agree with the appellant bank that such a generally adopted method of safeguarding valuables [conduct of a safe-deposit box business] must be considered a banking function authorized by Congress.
>
> . . .
>
> "Congress has not legislated against taxation of the customers of national banks. This court has approved a tax assessed upon the deposits of customers of national banks. By section 6 of the Colorado act the 'person rendering or performing services . . . shall be liable' for the payment of the tax imposed. But as subsection (b) of that same section requires the tax paid to be added to the charges for services 'as a separate and distinct item,' and makes it a debt from the user of the services until paid, the tax is upon the user of the safe deposit boxes, not upon the

> bank. Furthermore, as by section 2(h) credit is given to the bank for taxes paid on accounts subsequently found worthless and the bank is in a position to require payment of box rentals and taxes in advance, there is no occasion for a bank ever to have saddled upon it any part of the tax burden.
>
> "The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself. The funds which were received by the State came from the assets of the asset, not from those of the federal instrumentality, the bank."

It is apparent from the foregoing quoted language that as between the State of Colorado and the bank, the legal incidence of the tax was on the bank. The bank was required to collect it from the asset, and thus, the asset became indebted to the bank for the amount of the tax. Since the bank could collect from the asset in advance, there was no occasion for the bank to ever be saddled with any part of the burden. The asset, who was ultimately liable for the tax, was the taxpayer, and not the bank.

"In the case now before us, the gross receipts tax is imposed on any person engaging in business in New Mexico." Section 72-16-4 N.M.S.A. 1953 Repl. Vol. 10, pt. 2, Supp. 1961. As between the State of New Mexico and the Bank, the legal incidence of the tax is on the Bank. The Bank is not required to collect the tax from the customers of the bank. It receives [illegible] from [illegible] Section 72-16-9 N.M.S.A. 1953 (Repl. Vol. 10, pt. 2, Supp. 1961), and, as a fact, it has done so and has entered into a contract whereby the tax is made a debt of the assets of the customer to the

*Opinion of the Court of Appeals*

Bank. There is no occasion for the Bank to ever be saddled with any portion of the tax-burden. The funds with which the tax has been paid came from the four using banks, not from the Bank. Thus, the four users are in fact the taxpayers. Also, we might add that, although there is no obligation under our statute for the person responsible for the tax to pass it on to the buyer or lessee, it is a common practice in New Mexico to so pass it on.

Our conclusions from what has been said are:

(1) The services involved are not reasonably necessary or incident to the business or functions of a national bank, and, therefore, are not immune from taxation under the provisions of 12 U.S.C. § 548 (1964).

(2) In any event, the Bank is not the "real taxpayer."

The decision of the Commissioner should be affirmed.

It is so Ordered.

Judge

I concur:

Judge

Seth, Judge (dissenting)

I do not think that a state has the power to impose a tax upon a national bank except as is permitted by Congress. [illegible] First Agricultural National Bank of Rockford v. [illegible] State Tax Commission, 392 U.S. 339, 88 S.Ct. [illegible] 20 L.Ed.2d 1238 (1968); Union Bank v. First Congress [illegible] Decker, 288 U.S. 181, 53 S.Ct. 321, 77 L.Ed. 685, 87 A.L.R. 1428 (1933); Iowa-Des Moines National Bank

v. Bennett, 284 U.S. 239, 52 S.Ct. 133, 76 L.Ed. 265 (1931); First National Bank of Hartford, Wis. v. City of Hartford, 273 U.S. 548, 47 S.Ct. 462, 71 L.Ed. 767, 59 A.L.R. 1 (1927); Des Moines National Bank v. Fairweather, 263 U.S. 103, 44 S.Ct. 23, 68 L.Ed. 191 (1923); First National Bank of Gulfport, Miss. v. Adams, 258 U.S. 362, 42 S.Ct. 323, 66 L.Ed. 661 (1922); Owensboro National Bank v. City of Owensboro, 173 U.S. 664, 19 S.Ct. 537, 43 L.Ed. 850 (1899).

The Act of Congress, 12 U.S.C.A. § 548, furnishes the exclusive basis for the imposition of a tax by a state upon a national bank. First Agricultural National Bank of Berkshire County v. State Tax Commission, supra; Iowa-Des Moines Nat. Bank v. Bennett, supra.

The majority affirm the tax levy involved upon the grounds (1) that the activity engaged in by the bank and forming the basis for the tax levy was outside its corporate powers, and (2) the contract under which the bank rendered services to which the tax related permits the bank to charge those it serves the amount of the tax imposed.

I doubt that the activity is actually outside the scope of the bank's corporate powers but, if so, such action on the bank's part furnishes no ground, in my opinion, for the state to usurp a taxing power which it does not possess.

The identity of the taxpayer is not changed because it engages in an ultra vires activity. The tax is still directed against the bank and payment is still required to be made from its property and assets.

The majority seem to take the view that the Congressional Act is a limitation upon the power of the state to lay taxes upon a national bank and from this premise they reason that the Congress did not intend to limit the right of the state

to tax services not incident to the bank's corporate powers. The difficulty with this reasoning, in my opinion, is simply that the Congressional Act is a grant of authority or permission to impose a tax and is not a limitation upon the right of the state to tax. In other words, the state has no right to tax a national bank except in the manner authorized by the Act. The Act clearly does not grant permission to the states to tax a national bank with respect to an activity which is ultra vires. To justify such levy the state should point to permissive language in Congressional legislation, which, of course, it is unable to do.

The contract under which the bank renders services to others provides, in substance, that those to whom the service is rendered will repay to the bank any tax on account of such service which it is lawfully required to pay. The liability accrues only if the tax is lawfully levied. The contract, therefore, does not permit avoidance of the issue of lawfulness of the levy as against the bank, nor is it justification for the state to impose the tax unless it is lawful so to do.

I respectfully dissent.

/s/ Waldo Spiess
Chief Judge, Court of Appeals

## Order of the Supreme Court

IN THE
SUPREME COURT OF THE STATE OF NEW MEXICO

Wednesday, October 15, 1969

No. 8920

THE FIRST NATIONAL BANK OF SANTA FE,

Applicant,

—vs.—

THE COMMISSIONER OF REVENUE OF THE STATE OF NEW MEXICO,

Respondent.

ORIGINAL PROCEEDING IN CERTIORARI.

This cause coming on before the Court for consideration on Application for Writ of Certiorari directed to the Court of Appeals of the State of New Mexico, and the Court having considered said Application and being sufficiently advised in the premises;

IT IS ORDERED that Application for Writ of Certiorari be and the same is hereby denied.

IT IS FURTHER ORDERED that the record in Court of Appeals Cause No. 288 be and the same is hereby returned to the Clerk of the Court of Appeals.

## Final Judgment of the Court of Appeals

IN THE
COURT OF APPEALS
OF THE STATE OF NEW MEXICO

Wednesday, October 15, 1969

No. 288

THE FIRST NATIONAL BANK OF SANTA FE,

Claimant, Appellant,

vs.

THE COMMISSIONER OF REVENUE OF THE STATE OF NEW MEXICO,

Appellee.

Direct Appeal

Final Order

This cause having heretofore been submitted and taken under advisement and an opinion of the Court having been handed down on the 4th day of September, 1969, and application for writ of certiorari having been denied by the Supreme Court of the State of New Mexico,

It Is Therefore, Ordered that the Order of the Court entered herein on the 4th day of September, 1969 affirming the decision of the Commissioner of Revenue herein be and the same is hereby made final.

## Decision of the Commissioner of Revenue

State of New Mexico
County of Santa Fe
Before the Commissioner of Revenue

In the Matter of the
Petition for Refund of
The First National Bank of Santa Fe

DECISION

FINDINGS OF FACT

1. F. A. Vigil is the duly appointed, qualified, and acting Commissioner of Revenue of the State of New Mexico.

2. Petitioner, The First National Bank of Santa Fe, is a national banking corporation organized and existing under and by virtue of 12 U. S. C. A. Sec. 21 et seq., being the Acts of Congress relating to national banks. Petitioner's principal office and place of business is in Santa Fe, New Mexico.

3. The Bureau of Revenue has assessed and collected from petitioner gross receipts and municipal gross receipts taxes, with penalties and interest, upon the basis of fees charged and service rendered by petitioner, as outlined in these findings, for a total at the date of the stipulation of facts of $2,568.23 for the taxable period July 1, 1967 through September 30, 1968.

4. Believing it was and is not liable for the taxes thus imposed, Petitioner filed its written petition for refund, which was timely filed, stated the nature of Petitioner's complaint and the affirmative relief requested.

5. Petitioner owns an electronic data processing machine upon which it maintains and processes its own demand deposit and checking account records for its own customers' accounts.

6. Electronic data processing equipment is a recently developed machine or device capable of doing bookkeeping and accounting mechanically, as well as producing a printed reproduction of the information thus recorded.

7. Petitioner acquired its electronic data processing equipment in August of 1966.

8. Beginning on or after July 1, 1967, Petitioner entered into contracts with The First State Bank of Taos, New Mexico, Bank of Las Vegas, Bank of Santa Fe, (all state banking associations), and Valley National Bank of Espanola (a national association), or some of them, to maintain and process their similar respective demand deposit checking account records for their respective customer accounts upon petitioner's machine, for a fee determined by the activity and number of accounts each bank presented for processing. None of the four banks last mentioned is a subsidiary of or otherwise connected in any manner with petitioner's management. Each of the five banks in question is a completely separate legal entity, none exercising nor having the right to exercise any control over any of the others.

9. Electronic data processing, such as is employed by Petitioner, is an accounting convenience but not a necessity

in the performance of the regular banking functions of Petitioner or any other bank using such a service.

10. The regular banking functions of the four banks to which Petitioner is rendering electronic data processing service would not be halted if Petitioner were not to make such service available to them.

11. Electronic data processing is a service available commercially to banks by non-banking institutions at Albuquerque, New Mexico, and elsewhere.

12. The electronic data processing service Petitioner renders other banks is rendered on a commercial contract basis.

13. Attached to Petitioner's claim for refund is a copy of the form of contract between Petitioner and each of the four banks with which it has contracted to perform an electronic data processing service. The four contracts are alike except as to date and name of contracting bank.

14. The gross receipts tax imposed by the State upon Petitioner is upon Petitioner's receipts for rendering a bookkeeping or accounting service commercially to four other banks to whom it is under no obligation, except for the contracts aforesaid, to render this or any other service.

15. The tax imposed upon Petitioner is not a sales or use tax imposed upon Petitioner's purchase of tangible personal property for its own use.

*Decision of the Commissioner of Revenue*

16. Under the terms of the contract whereby The First National Bank of Santa Fe agreed to furnish a "demand deposit computer service" to other banks for stipulated charges, it is expressly agreed such other banks will pay to The First National Bank of Santa Fe the amount of all taxes or assessments "which may be lawfully levied or assessed by any government or other taxing authority having jurisdiction to levy such tax or assessment" by reason of its gross receipts for performing an electronic data processing service at the Computer Center of The First National Bank of Santa Fe.

17. The gross receipts tax in question was passed on by Petitioner to the corporation for whom it rendered a computerized electronic data processing service. Petitioner is obligated to refund said money to said corporations if successful in securing the refund claimed herein.

18. Under the terms of the contract whereby The First National Bank of Santa Fe agreed to furnish a "demand deposit computer service" to other banks for stipulated charges, it is expressly agreed such other banks will pay to The First National Bank of Santa Fe the amount of all taxes or assessments "which may be lawfully levied or assessed by any government or other taxing authority having jurisdiction to levy such tax or assessment" by reason of its gross receipts for performing an electronic data processing service at the Computer Center of The First National Bank of Santa Fe.

19. Petitioner has raised and relies herein upon those legal theories set forth in its Petition for Refund. Said legal

theories set forth in its Petition for Refund are the following:

a. Petitioner is a national bank and as such is an agency and instrumentality of the United States and the exaction of such a tax is contrary to and in violation of the Constitution and the laws of the United States and is in contravention of 12 U.S.C.A. Sec. 548.

b. That the State of New Mexico is without power to tax the Petitioner or any other national bank save as permitted by Congress, and Congress has not sanctioned the imposition of the subject tax in this instance.

c. Petitioner being an agency and instrumentality of the United States is specifically exempt from the gross receipts tax by Section 2 of 12 U.S.C.A. N.M.S.A. Pocket Supplement.

d. That the banking services sought to be taxed are specifically exempt by Section 2 of 12 U.S.C.A. N.M.S.A. Pocket Supplement.

20. The Commissioner of Revenue has not admitted but instead has denied that the gross receipts tax imposed upon petitioner is either illegal or unlawful, on the contrary contending it is a lawful imposition upon the receipts of Petitioner from commercial bank services, contracts, and upon the receipts of Petitioner for performing banking functions.

## Conclusions of Law

A. The charter of Petitioner confers upon it only those powers specifically granted by 12 U.S.C.A. 24 and such

# APPENDIX B

# APPENDIX B

## Statutes

Section 2 of the National Bank Act, 13 Stat. 101 (1864), as amended, 12 U.S.C. § 24, reads in relevant part as follows:

> Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—
>
> . . . . . .
>
> Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter.

Section 5219 of the Revised Statutes, 44 Stat. 223 (1926), 12 U.S.C. § 548, read during the period involved in this case as follows:

> The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measure

ured by their net income, provided the following conditions are complied with:

First: (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares, the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided*, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or invested in the banking or investment business, and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: *Provided, however*, That a State which imposes a tax on or according to or measured by the net income of an association may substitute for such tax one on financial, mercantile, manufacturing, and business corporations, organized under the laws of other States and also impose a tax upon the income of individuals may include as such individual income dividends from national banking associations located within the State on condition that it also

*Statutes*

Section 4 of the Bank Service Corporation Act of 1962, 76 Stat. 1132 (1962), 12 U.S.C. § 1864, reads as follows:

limitations and restrictions specifically set forth in such provisions, a State or political subdivision thereof may impose any tax which is imposed generally on a nondiscriminatory basis throughout the jurisdiction of such State or political subdivision (other than a tax on intangible personal property) on a national bank having its principal office within such State in the same manner and to the same extent as such tax is imposed on a bank organized and existing under the laws of such State.

(b) Except as otherwise herein provided, the legislature of each State may impose, and may authorize any political subdivision thereof to impose, the following taxes on a national bank not having its principal office located within the jurisdiction of such State, if such taxes are imposed generally throughout such jurisdiction on a non-discriminatory basis:

(1) Sales taxes and use taxes complementary thereto upon purchases, sales, and use within such jurisdiction.

(2) Taxes on real property or on the occupancy of real property located within such jurisdiction.

(3) Taxes (including documentary stamp taxes) on the execution, delivery, or recordation of documents within such jurisdiction.

(4) Taxes on tangible personal property (not including cash or currency) located within such jurisdiction.

(5) License, registration, transfer, excise, or other fees or taxes imposed on the ownership, use, or transfer of tangible personal property located within such jurisdiction.

(c) No sales tax or use tax complementary thereto shall be imposed pursuant to this paragraph 5 upon purchases, sales, and use within the taxing jurisdiction of tangible personal property which is the subject matter of a written contract of purchase entered into by a national bank prior to September 1, 1969.

(d) As used in this paragraph 5, the term 'State' means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and Guam.

Effective January 1, 1972, P.L. 91-156 amends section 5219 to read as follows:

For the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.

No bank service corporation may engage in any activity other than the performance of bank services for banks.

Section 6 of the New Mexico Banking and Financial Corporations Tax Act, N.M. Stat. § 72-15B-6, effective January 1, 1969, reads as follows:

> *Tax in lieu of other taxes—Exceptions.*—The taxes imposed by sections 3 and 4 of the Banking and Financial Corporations Tax Act [72-15B-3, 72-15B-4] are in lieu of all other taxes imposed by the state and its political subdivisions upon banks and financial corporations for calendar year 1969 and all subsequent years, except taxes upon their real property and taxes arising from activities which are not in the course of their regular banking and financial corporation functions.

Section 4 of the New Mexico Gross Receipts and Compensating Tax Act, N.M. Stat. § 72-16A-4, read during the period involved in this case as follows:

> *Imposition and rate of tax—Denomination as "gross receipts tax."*—A. For the privilege of engaging in business, an excise tax equal to three per cent [3%] of gross receipts is imposed on any person engaging in business in New Mexico.
>
> B. The tax imposed by this section shall be referred to as the "gross receipts tax."*

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* Effective July 1, 1969 this section was amended to impose a tax at the rate of four per cent instead of three per cent of gross receipts.

*Statutes*

Section 12.8 of the New Mexico Gross Receipts and Compensating Tax Act, N.M. Stat. § 72-16A-12.8, effective July 1, 1969, reads as follows:

> *Exemption—Gross receipts tax—Banks and financial corporations.*—Exempted from the gross receipts tax are the receipts of banks and financial corporations from selling or leasing property or services in the course of their regular banking and financial corporation functions.

IN THE

# Supreme Court of the United States

**October Term, 1969**

No. 1171

THE FIRST NATIONAL BANK OF SANTA FE
*Appellant*

v.

THE COMMISSIONER OF REVENUE OF THE STATE OF NEW MEXICO
*Appellee*

**On Appeal from the Court of Appeals of the State of New Mexico**

## MOTION TO DISMISS OR TO AFFIRM AND SUPPORTING BRIEF


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IN THE

# Supreme Court of the United States

**October Term, 1969**

No. 1171

---

THE FIRST NATIONAL BANK OF SANTA FE

*Appellant*

v.

THE COMMISSIONER OF REVENUE OF THE STATE OF NEW MEXICO

*Appellee*

---

**On Appeal from the Court of Appeals of the State of New Mexico**

## MOTION TO DISMISS OR TO AFFIRM

Appellee moves to dismiss the appeal or, in the alternative, to affirm the decision below, on the ground that there is no substantial federal question presented, in that:

I – The results reached by the Court below are highly consistent with the long-established policy of competitive equality between state and national banks and legislative enactments both by Congress and the New Mexico Legislature while this case was pending confirm those results;

II – The decision below does not rule on the question of the authority of national banks to provide data processing services to banks and others and pending cases in federal courts meet this *ultra vires* issue head-on and offer the most direct and appropriate way of determining the issue; and

III – The Appellant Bank is not the "real taxpayer" or, at least, has suffered no economic burden for the tax, due to the agreement to pass the tax on to the consumer banks.

## Jurisdiction

This motion to dismiss or to affirm is filed under Rule 16 of the Court to question the substantiality of the federal question raised by Appellant's Jurisdictional Statement (Juris. Stmt.) filed herein on 11 February, 1970. Lack of a substantial federal question is a recognized basis for the Court to dismiss appeals prosecuted, as this one is, under 28 U.S.C. Sec.1257(2), 2101(c), or to affirm the results below. [Rule 16 1.(b)(c)].

## Questions Presented

1. Where a state has imposed upon a national bank gross receipts taxes on electronic data processing services performed by it for other banks, is a substantial federal question presented on appeal under 28 U.S.C. Sec.1257(2), 2101(c) –

a. when the results reached by the Court below are highly consistent with the long-established policy of competitive equality between state and national banks and legislative enactments both by Congress and the New Mexico Legislature while this case was pending confirm those results;

b. when the decision below does not rule on the question of the authority of national banks to provide data processing services to banks and others and pending cases in federal courts meet this *ultra vires* issue head-on and offer the most direct and appropriate way of determining the issue; and

c. when the Appellant Bank is not the "real taxpayer" or, at least, has suffered no economic burden for the tax, due to the agreement to pass the tax on to the consumer banks?

## Statement

**Basis for the decision below.**

The New Mexico Court of Appeals based its decision in this case on two grounds:

"(1) The services here involved are not reasonably necessary or incident to the business or functions of a national bank, and, therefore, are not immune from taxation under the provisions of 12 U.S.C. Sec. 548 (1964).

"(2) In any event, the Bank is not the 'real taxpayer'." (Juris. Stmt. p.13a)

Nowhere in the majority opinion below is it held that the Appellant Bank in this case was performing services *ultra vires* its charter under the National Bank Act [12 U.S.C. Sec.24(7)]. Indeed, it was Appellant's contention both before the Commissioner of Revenue and in the Court of Appeals that Appellee had no standing to raise the issue (Appendix A, infra p. A-1) and Appellee conceded the point for purposes of this case (Appendix A, infra p. A-1).

The decision below represents, rather, an interpretation of federal law and decisions of this Court resulting in the conclusion that:

". . . Congress does not intend that the performance of these services may not be taxed by a state. It seems illogical to us to hold that Congress intended to limit a state's taxation on functions or services performed by national banks, when such functions or services are clearly not necessary, and not reasonably incident, to the execution of the powers conferred by Congress thereon." (Juris. Stmt. p.4a).

The Court of Appeals based this conclusion on three specific factors, which it stated as follows:

1. "[t]he fact that the enumerated powers of a national bank do not include the performance of such services for other banks;

2. "the fact that Bank Service Corporations are expressly empowered to perform such services for banks;" and

3. "the fact that Congress has not limited the taxation by a state of Bank Service Corporations. . ." (Juris. Stmt., p.4a)

The Court below did not go into the question of whether national banks have implied or incidental authority under 12 U.S.C. Sec.24(7) to render data processing services to banks and others. Nor did it make any mention of the affirmative ruling of the Comptroller of Currency on the subject (Comptroller's *Manual for National Banks*, Rulings, Sec.3500.) In fact, the Comptroller's ruling was not referred to in the briefs or in argument of counsel submitted to the Court.

The decision below is, therefore, not a direct and specific ruling on the issue of *ultra vires* activities. In not ruling on that issue (nor on the preliminary question of standing to raise it) the Court of Appeals has, in effect, said that the *ultra vires* issue is not the basis for its decision. The real basis is clearly stated in the following language from the Court's opinion:

> "We are of the opinion that the question of the propriety of the imposition of a tax on an activity or service performed by a national bank should be determined on the basis of whether the activity or service is reasonably related or incidental to the accomplishment of its bank functions." (Juris. Stmt. p.6a).

In this connection, we refer the Court to the following stipulated facts in the record below quoted in the opinion of the Court of Appeals:

> "Electronic data processing of such accounts is a convenience but not a necessity for the conduct of the banking functions of any of the banks. It is a service made available commercially by non-banking institutions in Albuquerque and elsewhere." (Juris. Stmt., p.2a, 3a).

**Legislation consistent with the ruling below.**

The Appellant Bank's claim for refund was filed in Appellee's office on August 5, 1968 and the claim was denied on December 13, 1968 (Juris. Stmt. p.18a). Appellant appealed directly

to the New Mexico Court of Appeals on January 7, 1969.

While the case was pending on appeal, the New Mexico Legislature changed the state's choice of method under 12 U.S.C. Sec.548 in taxing national banks. (Ch.151, Laws of 1969, enacted April 1, 1969, and effective June 22, 1969 for fiscal years beginning after January 1, 1969; see Appendix B, p. B-1). The change was from taxing the shares of such banks to taxing their net income. By section 6 of the new law the tax on net income is specifically stated to be:

> ". . . in lieu of all other taxes imposed by the state and its political subdivisions upon banks and financial corporations for calendar year 1969 and all subsequent years, except taxes upon their real property and taxes arising from activities which are not in the course of their regular banking and financial corporation functions." (Appendix B, p.B-2).

This law applies equally to state chartered banks. (Section 72-15B-2 B., Appendix B, p.B-1).

On September 5, 1969, the Court of Appeals rendered its decision. (Juris. Stmt. p.1a). It became final on October 15, 1969, when the New Mexico Supreme Court denied certiorari (Juris. Stmt. p.16a).

Meanwhile, there were introduced in Congress proposed amendments to 12 U.S.C. Sec.548 which in final form, expressly provided that a state could impose on a national bank taxes such as those imposed in this case, so long as it was "in the same manner and to the same extent as such tax is imposed on a bank organized and existing under the laws of such state." This legislation became law on December 24, 1969, when signed by the President, and became effective on January 1, 1970. (P.L. 91-156, 91st Cong., 1st Session (1969), see Juris. Stmt. p.27a, n.)

During all times material to these proceedings, state chartered banks in New Mexico were and are equally subject to the gross

receipts tax imposed on Appellant in this case. (Sec.72-16A-4 and Sec.72-16A-12.8, N.M.S.A., 1953 Compilation; see Juris. Stmt. pp.29a, 30a).

**Pending federal cases raising ultra vires issue.**

As has been pointed out in Appellant's Jurisdictional Statement (pp.15, 16), at least two cases in the federal courts, both reaching this Court on "standing" questions, raise directly the issue of whether or not national banks are lawfully authorized to provide data processing services to banks and others. The validity of the ruling of the Comptroller of Currency is squarely involved.

One such case is *Associated Data Processing Service Organizations, Inc., et al. v. William B. Camp, Comptroller of Currency, et al.*, (CA-8, 1969) 406 F.2d 837, cert. gtd. 395 U.S. 976 (1969). On certiorari, this Court ruled on March 3, 1970, that petitioner had standing to challenge the bank's authority and the Comptroller's ruling. The case was remanded for a hearing on the merits.

Another such case is *Arnold Tours, Inc., et al., v. Camp, et al.*, (CA-1, 1969) 408 F.2d 1147, in which petitions for writs of certiorari on the "standing" question under the titles *Industrial Nat'l. Bank v. Wingate Corp.*, (No. 129, Oct. Term, 1969), and *Camp v. Wingate Corp.*, (No. 225, Oct. Term, 1969) were denied by the Court on March 23, 1970. These proceedings, too, involve the issue of whether national banks are prohibited from directly entering into the data processing service business.

Both the *Association* and *Wingate* cases involve a head-on confrontation between national banks, supported by the Comptroller of Currency, and commercial data processing businesses over the *ultra vires* issue. Neither have been yet fully tried on the merits.

## Reasoning and Precedents

As is stated in the motion, there are three good reasons why this appeal does not present a substantial federal question. We will discuss them here in order.

### I

**The results reached by the Court below are highly consistent with the long-established policy of competitive equality between state and national banks and legislative enactments both by Congress and the New Mexico Legislature while this case was pending confirm those results.**

At the outset we emphasize that Appellant Bank has stipulated in this case that:

> "Electronic data processing of such accounts is a convenience but not a necessity for the conduct of the banking functions of any of the banks. It is a service made available commercially by non-banking institutions in Albuquerque and elsewhere."

As has been shown (Statement, p. 2, supra) the basis for the decision below was an interpretation of 12 U.S.C. Sec.548, prior to the 1969 amendment, that Congress did not intend such non-banking activities on the part of national banks to go untaxed by the state simply because of the bank's status as a federally chartered organization.

The Court of Appeals distinguished this Court's decisions in *First Agricultural National Bank of Berkshire County v. State Tax Commission*, 392 U.S. 339, 88 S.Ct. 2173, 20 L.Ed.2d 1138 (1968) and related cases. The ground for the distinction was that those cases did not involve commercial non-banking services and, further, that they did not involve activities as to which Congress had specifically acted in authorizing Bank Service Corporations [12 U.S.C. Ch.18 (1964)] to perform data process-

ing service for banks without limitation as to state taxation.

This distinction and the lower court's ruling was entirely consistent with the policy of "competitive equality" between state and federal banks which has for years been "firmly embedded in the statutes governing the national banking system." *First National Bank v. Dickinson*, 396 U.S. 122 (1969).

Under New Mexico law (Juris. Stmt. p.29a) there is no doubt that state banks, at the time of the levying of the taxes involved in this case, were subject to the same gross receipts tax on the same kind of services. They continue to be so subject (Juris. Stmt. pp.29a, 30a).

Appellant asserts (Juris. Stmt. p.9) that the lower court's ruling subjects it to "disabling and openly discriminatory" taxation. We suggest to the Court that this is patently untrue. On the contrary, the ruling places both state and national banks on equal competitive footing as to state taxation of gross receipts from data processing services for banks and others. It does the same thing between national banks and bank service corporations as to state taxation of such services for banks alone.

As Mr. Justice Marshall points out in his dissenting opinion in the *First Agricultural Nat'l. Bank* case (392 U.S. p.360), ". . . the purpose of the section [12 U.S.C. Sec.548] was to insure competitive equality of the banks with other business. . ."

That the decision of the Court of Appeals is obviously in conformity with the underlying statutory policy of "competitive equality" in the banking field is further borne out by the confirming legislation of both Congress and the New Mexico Legislature during the time when this case was being decided below. (Statement, p.4, supra).

These enactments are, we suggest, remarkably harmonious in their application to the fact situation presented by this case.

New Mexico says on the one hand: "Our gross receipts tax applies to all bank activities not in the regular course of banking functions." Congress says on the other hand: "That's fine, so long as you treat national banks the same as state banks."

We further suggest to the Court that these enactments are, insofar as they apply to a case such as this, a restatement of existing law, as analyzed and stated by the Court of Appeals. And, in view of Appellant's admission that data processing services for other banks are not necessary to the performing of its banking functions, and therefore not rendered in the course of regular banking functions, it would seem clear that there is no substantial federal question presented for review.

For this reason, the case would seem to be one in which a Motion to Affirm is well-taken.

## II

**The decision below does not rule on the question of the authority of national banks to provide data processing services to banks and others and pending cases in federal courts meet this ultra vires issue head-on and offer the most direct and appropriate way of determining the issue.**

Appellant, in its Jurisdictional Statement (pp.12, et seq.) has taken great pains to assert that the decision below is a direct ruling on the authority of national banks to engage in the data processing business. From this, Appellant urges the Court to accept jurisdiction and settle the *ultra vires* issue, including the question of the validity of the ruling of the Comptroller of Currency.

We think the assertion is in error and that a fair reading of the opinion below reveals that there was no such ruling (see Statement, p.4, supra). That the dissenting opinion below (Juris. Stmt. p.14a) so characterizing the majority ruling does not aid

Appellant because that, too, we believe, is a misreading of what the majority said.

It is firmly established law that this Court will not undertake review of an asserted federal question in cases such as this unless the state court has in fact directly ruled on the question. *Northwestern Bell Tel. Co. v. Nebraska State Ry. Comm.*, 297 U.S.471, 56 S.Ct. 536, 80 L.Ed. 810 (1936); *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969).

There being no express ruling on the *ultra vires* issue below, we suggest the Court should decline to review that question here.

Such a result is strongly supported by the fact that pending cases in the federal courts (Statement, p.6, supra), in which the Comptroller of Currency is a party, directly raise the authority question under circumstances bringing business competitors into head-on confrontation. These would appear to be preferable forums in which to resolve the conflict.

It should also be noted that the issue of whether national banks are constitutionally immune from state taxation as federal instrumentalities was not decided below. Cf. *Liberty Bank & Trust Co. v. Buscaglia*, 21 N.Y.2d 357, 235 N.E.2d 101 (1968), rev'd., 23 N.Y.2d 933, 246 N.E.2d 361 (1969) cert. den. 396 U.S. 941.

## III

**The Appellant Bank is not the "real taxpayer" or, at least, has suffered no economic burden for the tax, due to the agreement to pass the tax on to the consumer banks.**

The Court of Appeals ruled, alternatively, that Appellant Bank was, in this case, not the "real taxpayer". In doing so, it relied on *Colorado National Bank v. Bedford*, 310 U.S. 41, 60 S.Ct. 800, 84 L.Ed. 1067 (1940). We refer the Court to the lower Court's analysis and conclusion (Juris. Stmt. pp.10a–13a). While

it is true that, in *Bedford*, the Colorado law required the tax to be passed on and in New Mexico the pass-on is simply permitted, the *fact* of passing the tax on should be given significance in determining who is the "real taxpayer" for purposes of a claimed immunity under 12 U.S.C. Sec.548.

We also suggest that some significance should be given to the New Mexico compensating tax provisions (Sec.72-16A-10, N.M.S.A., 1953 Compilation; see Appendix B, p.B-3, infra). By its terms, this statute applies to anyone who "sells property or sells property and service" for use in New Mexico and who is not subject to the gross receipts tax on such sales. The seller is required to collect the tax from the consumer and pay it to the state. [Cf. *Northwestern National Bank of Sioux Falls v. Gillis*, 825 S.D. 457, 148 N.W.2d 293 (1967); also the dissent of Mr. Justice Harlan, *First Agricultural*, supra, at 392 U.S. p.363. While the applicability of the compensating tax provisions was not raised or ruled upon below, the statute is part of the usual legislative pattern in this field of taxation. It is, in practical effect, a compulsory pass-on provision designed to avoid technical "incidence of tax" arguments.

Whether the compensating tax applies or not, however, we suggest that the consumer banks in this case were the "real taxpayers".

A last consideration is the fact that in reality Appellant will suffer no economic burden from the imposition of this tax, having passed it on by contract to the consumer banks (Juris. Stmt. p. 21a, paragraphs 16 and 17).

True, the contract refers to taxes "lawfully" assessed. Such will, of course, be the case if this Court declines jurisdiction for lack of a substantial federal question and permits the decision below to stand as between the parties.

In view of the confirming legislation in both Congress and the New Mexico Legislature (Statement, p. 4, supra), there is no reason to expect the taxation issue to remain alive even if it should ultimately be held that national banks may lawfully engage in the data processing business. As has been pointed out, Appellant concedes that such activities are a "convenience" for the bank and not "essential to the performance of its banking function".

## CONCLUSION

**In summary, Appellee earnestly suggests to the Court that, for the reasons stated, this case does not present a substantial federal question for review and that the appeal should be dismissed or, in the alternative, that the decision below should be affirmed.**

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# APPENDIX A

Appellant Bank's contention before the Court of Appeals was that the Commissioner had no standing to raise the *ultra vires* question, as is shown by Point II of its brief in that Court:

"Point II

THE CONTENTION OF ULTRA VIRES TRANSACTIONS IS NOT AVAILABLE TO THE COMMISSIONER".

Appellee's answer to this point on appeal was as follows:

"Appellee's Answer to Point II

THE POINT IS CONCEDED BUT DOES NOT AFFECT THE RESULT IN THIS CASE.

Appellee concedes for purposes of this case and on the basis of the authority cited by Appellant that it has no standing to assert a claim of ultra vires acts by Appellant.

But this does not affect the result. Appellee does not seek at this time to restrain or forbid the activities of Appellant, merely to apply its tax laws equitably."

# APPENDIX B

## Statutes

In 1969, the New Mexico Legislature enacted a new "Banking and Financial Corporations Tax Act", as follows:

72-15B-1. Short title.—This act [72-15B-1 to 72-15B-9] may be cited as the "Banking and Financial Corporations Tax Act."

72-15B-2. Definitions. As used in the Banking and Financial Corporations Tax Act [72-15B-1 to 72-15B-9]:

A. "affiliated group" means that term as it is used in the Internal Revenue Code;

B. "bank" means any national banking association, state bank, or bank holding company;

C. "financial corporation" means any savings and loan association, or any incorporated savings and loan company, trust company, mortgage banking company, consumer finance company or other financial corporation;

D. "fiscal year" means any twelve [12] month accounting period ending on the last day of any month other than December;

E. "Internal Revenue Code" means the United States Internal Revenue Code, as amended;

F. "net income" means that part of the taxpayer's income generally defined as federal taxable income and it shall be computed in the same manner as provided in the Internal Revenue Code for computing federal taxable income, except that the income from federal, state and municipal securities must be included in the computation of net income for the purposes of the Banking and Financial Corporations Tax Act. Net income does not include amounts that have been taxed as income to another member of an affiliated group of corporations under the Income Tax Act [72-15A-1 to 72-15A-15]; and

G. "taxable year" means the calendar year or fiscal year for which net income is computed. In the event a return is

made for a fractional part of a year, taxable year includes the period for which the return is made.

72-15B-3. Imposition of tax on banks measured by net income—Method of taxing national banking associations. —An annual tax measured by net income is imposed upon every bank located within this state. New Mexico expressly adopts method number four as authorized for the taxation of national banking associations in 12 USC Sec. 548.

72-15B-4. Financial corporations Imposition of tax measured by net income. An annual tax measured by net income is imposed upon every financial corporation located within this state.

72-15B-5. Rate of tax on banks and financial corporations—Minimum tax.—A. The rate of tax on banks and financial corporations shall be six per cent [6%] of net income.

B. The tax on banks and financial corporations shall not be less than one hundred dollars ($100) for each taxable year.

72-15B-6. Tax in lieu of other taxes Exceptions. The taxes imposed by sections 3 and 4 of the Banking and Financial Corporations Tax Act [72-15B-3, 72-15B-4] are in lieu of all other taxes imposed by the state and its political subdivisions upon banks and financial corporations for calendar year 1969 and all subsequent years, except taxes upon their real property and taxes arising from activities which are not in the course of their regular banking and financial corporation functions.

72-15B-7. Income allocation. A. At the election of a bank or financial corporation, net income may be allocated and apportioned as provided in the Uniform Division of Income for Tax Purposes Act [72-15A-16 to 72-15A-36].

B. Deductions and exemptions permitted in computing federal taxable income and not specifically allocated in the Uniform Division of Income for Tax Purposes Act shall be equitably apportioned in accordance with regula-

tions prescribed by the commissioner of the bureau of revenue.

72-15B-8. Excessive rate of tax—Relief. Every bank or financial corporation subject to the provisions of the Banking and Financial Corporations Tax Act [72-15B-1 to 72-15B-9] shall be relieved of liability for any tax imposed by sections 3 or 4 [72-15B-3, 72-15B-4] of the act to the extent that the tax rate on these institutions exceeds the highest of the rates imposed by the state upon mercantile, manufacturing and business corporations doing business within its limits. For the purposes of this section, "tax rate" means that term as it is used in 12 USC Sec. 548.

72-15B-9. Taxpayer returns. Every bank or financial corporation subject to the Banking and Financial Corporations Tax Act [72-15B-1 to 72-15B-9] shall file a return on a form prescribed by the commissioner of revenue. The return shall be filed with the bureau of revenue on or before the fifteenth day of the fourth month following the end of each taxable year. The tax imposed by the Banking and Financial Corporations Tax Act is due and payment is required on or before the date when the return is required to be filed.

The New Mexico compensating tax law provides in part, as follows:

72-16A-10. Agents for collection of compensating tax—Duties. A. Every person carrying on or causing to be carried on any activity within this state attempting to exploit New Mexico's markets, who sells property or sells property and service for use in this state and who is not subject to the gross receipts tax on receipts from these sales shall collect the compensating tax from the buyer and pay over the tax collected to the bureau. "Activity," for the purposes of this section, includes, but is not limited to, engaging in any of the following in New Mexico: maintaining an office or other place of business, soliciting orders through employees or independent contractors, canvassing,

demonstrating, collecting money, warehousing or storing merchandise or delivering or distributing products as a consequence of an advertising or other sales program directed at potential customers.

B. To insure orderly and efficient collection of the public revenue, if any application of this section is held invalid, the section's application to other situations or persons shall not be affected.

72-16A-12.9. Exemption—Compensating tax—Banks and financial corporations.—Exempted from the compensating tax is the use of property by banks and financial corporations if the property is used in the course of their regular banking and financial corporation functions.

This exemption provision was enacted by New Mexico Laws of 1969, Ch. 144, Sec. 14.